STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 10, 2005
v	No. 253860 Kent Circuit Court
ROBERT LEE CARSON, Defendant-Appellant.	LC No. 03-002437-FH

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for breaking and entering with intent to commit larceny, MCL 750.110. The trial court sentenced him to six months in jail and eighteen months' probation. We affirm.

On July 14, 2002, many items were stolen from a "storage trailer" behind a gas station in the city of Wyoming. The door had been pried open, and the police found defendant's fingerprint on a metal bar or pole that was lying on the ground near the trailer. Between $1000 and $1200 worth of items, including soft drinks, car oil, and a wheelbarrow, were determined to be missing from the storage trailer.

In exchange for immunity, defendant's stepson testified that he, defendant, and another man had been drinking all day when he drove defendant and the other man to the gas station. Defendant and the other man took items from the storage trailer, and the three of them loaded the items into the van. Defendant testified that he was asleep in the van and awoke to find his stepson and the other man transferring items from the storage trailer into the van. Defendant claimed that he unsuccessfully attempted to stop them and return the items to the storage trailer. Defendant also stated that he used the metal bar or pole to try to close the broken door to the storage trailer.

Defendant raises several allegations of prosecutorial misconduct on appeal. First, defendant claims that the prosecutor committed misconduct while cross-examining defendant by insinuating his personal belief in defendant's guilt. Defense counsel raised one nonspecific objection during the prosecutor's cross-examination of defendant, but the trial court never addressed the objection. To preserve claims of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Because

defendant failed to specifically object to the prosecutor's questions and statements that formed the basis of the alleged misconduct, we review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Ackerman, supra* at 448. To avoid forfeiture under the plain error rule, three requirements must be met: "(1) an error must have occurred; (2) the error was plain; (3) and the plain error affected substantial rights, i.e., the defendant was prejudiced (the defendant generally must show that the error affected the outcome of the lower court proceedings)." *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003) citing *Carines, supra* at 763.

A prosecutor's comments must be reviewed case-by-case, examining the record and evaluating the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999). A prosecutor has the duty to provide a defendant with a fair trial. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Witnesses are entitled to respectful consideration, and a prosecutor may not inject unfounded prejudicial innuendo into the proceedings. *People v Whalen*, 390 Mich 672, 684; 213 NW2d 116 (1973); *People v Burrell*, 127 Mich App 721, 726; 339 NW2d 239 (1983). The challenged questions include: whether defendant thought it was convenient that he had fallen asleep, whether he was ashamed for getting his stepson involved, whether it was a coincidence that they ended up at the gas station and the storage trailer was broken into, and whether his testimony sounded ridiculous. To the extent that the prosecutor's questions may have been improper, we conclude that they did not deny defendant a fair and impartial trial. Moreover, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342, 352 (2004).

Defendant also contends that, during his closing argument, the prosecutor vouched for the credibility of defendant's stepson. Because defense counsel failed to object during the prosecutor's closing argument, we review this claim for plain error affecting defendant's substantial rights. *Barber, supra* at 296, citing *Carines*, *supra* at 763. Prosecutorial vouching occurs when a prosecutor makes personal assurances of a witness' veracity or when a prosecutor claims to have personal information or "special knowledge" of which the jury is unaware, lending to the credibility of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (discussing the prosecutor's reference to a plea agreement, which contained a promise of truthfulness). A prosecutor is, however, permitted to argue the evidence and all reasonable inferences drawn from the evidence. *Id.* at 282; *Ackerman*, *supra* at 451, 453-454. A prosecutor's arguments must be read in context and reviewed in light of defense arguments and the evidence admitted at trial. *Ackerman, supra* at 452.

After reviewing the record, we conclude that the prosecutor never expressed personal knowledge that the testimony of defendant's stepson was truthful or asserted that he had "special knowledge" of his credibility. *Bahoda*, *supra* at 276. The prosecutor argued that the testimony of defendant's stepson was credible because it matched the testimony of the gas station manager. However, the prosecutor also acknowledged that defendant's stepson did not want to testify, that he was "evasive," could not remember, and that it was difficult for him to testify against defendant. A prosecutor may argue from the evidence that a witness is worthy or not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor may argue from the facts the credibility of a witness when conflicting testimony exists and a

defendant's guilt or innocence rests on which version of the testimony the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Defendant's testimony conflicted with his stepson's testimony, and defense counsel acknowledged, "this case boils down to two witnesses[.]" We conclude that the prosecutor did not improperly vouch for the credibility of witnesses, and therefore, the prosecutor's remarks did not constitute plain error.

Defendant claims that the prosecutor improperly stated a personal belief in defendant's guilt during his closing argument when he stated:

> when you evaluate [defendant's] testimony, I want you to use one thing to evaluate, your common sense. If you buy that story, I have some land to sell you in Florida. Guess what? It's swamp land. That's what [defense counsel is] asking you to believe, the most ridiculous story I've heard in a long time.

The prosecutor also referred to defendant's statements as "ridiculous" and told the jury that defendant was "trying to pull the wool" over them and that defendant was "not believable." A prosecutor is permitted to argue that a defendant is not worthy of belief. See *Launsburry*, *supra* at 361. Moreover, a prosecutor may comment on the evidence or reasonable inferences drawn from the evidence to support his theory of the case and to refute a defendant's position. See *Ackerman*, *supra* at 452-454. The prosecutor argued that defendant's fingerprint was found on the metal bar or pole and urged the jury to use common sense to evaluate his testimony. He specifically stated that "I think the evidence shows beyond a reasonable doubt that [defendant] wanted to break into this storage shed, used the metal bar to prop open the door, and then proceeded to take stuff out of the shed and put it into the van." The prosecutor did not assert his personal belief that defendant was guilty. Instead, the prosecutor based his statements regarding defendant's guilt on the evidence or inferences drawn from the evidence and responded to defendant's arguments that he did not participate in the crime, but rather attempted to stop the others from committing it. Therefore, we conclude that the prosecutor's statements regarding defendant's guilt were not improper and did not constitute plain error. Moreover, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *Matuszak*, *supra* at 58.

Defendant next argues that the trial court erred in failing to provide the jury with the voluntary intoxication defense instruction. Because defense counsel failed to request this instruction or object to the jury instructions as given, this issue has not been preserved for appellate review. MCR 2.516(C); MCL 768.29; *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004). We therefore review it for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003).

Jury instructions are read as a whole, rather than extracted piecemeal to establish error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Even if somewhat imperfect, jury instructions do not warrant reversal if they "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence. *Id.*

Larceny is a specific intent crime, *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992), and, thus, breaking and entering with intent to commit larceny is a specific

intent crime. *People v Toole*, 227 Mich App 656, 660; 576 NW2d 441 (1998). At the time of the offense involved in the present case, voluntary intoxication was a defense to specific intent crimes. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996).[1] A voluntary intoxication defense instruction is only proper if the facts presented at trial could allow the jury to conclude that defendant's intoxication was so great that he was incapable of forming the necessary intent. *People v Mills*, 450 Mich 61, 82, 537 NW2d 909 (1995). Both defendant and his stepson testified that defendant was intoxicated. However, no evidence was presented that defendant was intoxicated to a point where he was incapable of forming the intent to take items from the storage trailer. In fact, defendant testified that he attempted to stop his stepson and the other man from transferring items into the van and attempted to return some of the items to the storage trailer. We therefore conclude that the trial court did not commit plain error in failing to sua sponte provide the jury with an instruction on the defense of voluntary intoxication.

Defendant argues that the trial court erred in not reading CJI2d 1.9, the standard criminal jury instruction on presumption of innocence, burden of proof, and reasonable doubt. Because defense counsel failed to request this instruction or object to the jury instructions as given, we review this issue for plain error affecting defendant's substantial rights. *Gonzalez, supra* at 642-643. The criminal jury instructions do not have the official sanction of this Court, and their use is not required. *People v Stephan*, 241 Mich App 482, 496; 616 NW2d 188 (2000). Furthermore, defendant has failed to show or explain how the given instruction constituted error or affected his substantial rights. An appellant may not simply announce a position or assert an error and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendant claims that his trial counsel was ineffective for the following reasons: failure to object to the prosecutor's closing argument, in which he improperly vouched for the credibility of defendant's stepson and improperly stated a personal belief in defendant's guilt; failure to object to the jury instruction on presumption of innocence, burden of proof, and reasonable doubt; and failure to request the voluntary intoxication jury instruction. Because defendant failed to file a motion for a new trial on these grounds or request a *Ginther*[2] hearing, this issue has not been preserved for appellate review, and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

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[1] MCL 768.37 abolished the voluntary intoxication defense for crimes committed after August 31, 2002.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Because we have determined that the prosecutor's closing argument was not improper and did not constitute plain error, we also conclude that defense counsel's objection would have been futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Similarly, we conclude that defense counsel's request for a jury instruction on the voluntary intoxication defense would have been futile. *Id.* Lastly, defendant has failed to show how or explain how the result of the proceedings would have been different if defense counsel had objected to the jury instruction on presumption of innocence, burden of proof, and reasonable doubt. An appellant may not simply announce a position or assert an error and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Kevorkian, supra* at 388-389, quoting *Mitcham, supra* at 203.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra